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BRIEF OF PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905

No. 105

ERNEST GATEWOOD, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH CAROLINA

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

ROBERT W. WINSTON,

VICTOR S. BRYANT,

Attys. for Pltff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 386.

ERNEST GATEWOOD, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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STATEMENT OF FACTS.

Plaintiff in error is operating in Roxboro, N. C., an office for the purpose of carrying on or engaging in the business of entering into contracts to sell and deliver stocks, bonds, etc., for future delivery. On the 10th of April, 1905, he received an order to purchase one hundred bales of cotton for future delivery. The purchaser deposited with him, by way of margin, $50.00 to cover fluctuations in the price of said cotton. Settlement by said parties was agreed to be made upon the difference in value of said cotton at that date and the date of delivery. The defendant, likewise, posted and published in his office at Roxboro, on the 10th of April, information showing the fluctuations in the prices of grain and other commodities. In other words, the things which defendant did are claimed to be criminal under an Act of General Assembly of North Carolina, to-wit: Laws of 1905, Chapter 538, which is as follows:

"The General Assembly of North Carolina do enact:

SECTION 1. That it shall be unlawful for any person, corporation or other association of persons, either as principal or agents, to establish or open an office or other place of business in this State for the purpose of carrying on or engaging in any such business as is forbidden in this Act or in Chapter 221 of the Public Laws of North Carolina of 1889.

SEC. 2. Any person, corporation or other association of persons, who shall as principal or agents, violate Section 1 of this Act shall be guilty of a misdemeanor, and upon conviction thereof shall be fined and imprisoned, at the discretion of the Court.

SEC. 3. That no person shall be excused on any prosecution under Chapter 221 of the Public Laws of 1889 and the amendments thereto, from testifying touching anything done by himself or others contrary to the provisions of said Act and the amendment; but no discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done or participated in by him.

SEC. 4. That in all prosecutions under said Act and amendment, proof that the defendant was a party to a con-

tract, as agent or principal to sell and deliver any article, thing or property specified or named in said Act, Chapter 221, Public Laws of 1889, or that he was the agent directly or indirectly of any party in making, furthering or effectuating the same, or that he was the agent or officer of any corporation or association, or person in making, furthering or effectuating the same, and that the article, thing or property agreed to be sold and delivered was not actually delivered, and that settlement was made or agreed to be made, upon the difference in value of said article, thing or property shall constitute against such defendant *prima facie* evidence of guilt.

SEC. 5. That proof that anything of value agreed to be sold and delivered was not actually delivered at the time of making the agreement to sell and deliver, and that one of the parties to such an agreement deposited or secured, or agreed to deposit or secure what are commonly called "margins," shall constitute *prima facie* evidence of a contract declared void by Chapter 221 of the Public Laws of 1889.

SEC. 6. That proof that any person, corporation or other association of persons, either principals or agents, shall establish an office or place where are posted or published from information received the fluctuating prices of grain, cotton, provisions, stocks, bonds and other commodities or of any one or more of the same, shall constitute *prima facie* evidence of being guilty of violating Section 1 of this Act, and of Chapter 221 of the Public Laws of 1889.

SEC. 7. That this Act shall not be construed so as to apply to any person, firm, corporation, or his or their agent, engaged in the business of manufacturing or wholesale merchandising, in the purchase or sale of the necessary commodities required in the ordinary course of their business.

SEC. 8. This Act shall be in force from and after its ratification.

Ratified March 6th, 1905."

It is deemed material also to set out the Act of 1889 referred to in the above Act. Laws of 1889, Chapter 221, is as follows:

"The General Assembly of North Carolina do enact:

SECTION 1. That every contract, whether in writing or not, whereby any person or persons, corporation or corpora-

tions, shall agree to sell or deliver any cotton, Indian corn, wheat, rye, oats, tobacco, meal, lard, bacon, salt, fish, beef-cattle, sugar, coffee, stocks, bonds, and choses in action, at a place or places and at a time or times specified and agreed upon therein, to any person or persons, corporation or corporations, whether the person to whom such article is so agreed to be sold and delivered shall be a party to such contract or not, when, in fact, and notwithstanding the terms expressed in such contract, it is not intended by the parties thereto that the articles or things so agreed to be sold and delivered shall be actually delivered, or the value thereof paid, but it is intended and understood by them that money or other thing of value shall be paid to the one party by the other, or to a third party, the party to whom such payment of money or other thing of value shall be made to depend, and the amount of such money or other thing of value so to be paid to depend upon whether the market price or value of the article so agreed to be sold and delivered is greater or less at the time and place so specified than the price stipulated to be paid and received for the articles so to be sold and delivered; and every contract commonly called 'futures' as to the several articles and things hereinbefore specified, or any of them, by whatever other name called, and every contract as to the said several articles and things, or any of them, whereby the parties thereto contemplate and intend no real transaction as to the article or thing agreed to be delivered, but only the payment of a sum of money or other thing of value, such payment and the amount thereof and the person to whom the same is to be paid to depend on whether or not the market price or value is greater or less than the price so agreed to be paid for the said article or thing at the time and place specified in such contract, shall be utterly null and void and of no effect in law or equity; and no action shall be maintained in any Court in this State to enforce any such contract, whether the same was made in or out of the State, or partly in and partly out of this State, and whether made by the parties thereto, by themselves or by or through their agents, immediately or mediately; nor shall any party to any such contract, or any agent or agents of any such party, directly or remotely connected with any such contract in any way whatever, have or maintain any action or cause of action on account of any money or other thing of value paid or advanced or hypothecated by him or them in connection with or on account of such contract and agency.

SEC. 2. That when the defendant or defendants in any action pending in any Court in this State shall allege specifically in his or their answer that the cause of action alleged in the complaint is in fact founded upon a contract such as is by this Act made void, and such answer shall be verified, then, and in that case, the burden shall be upon the plaintiff in such action to prove by the proper evidence thereof, that the contract sued upon is a lawful one in its nature and purposes; that the defendant may likewise produce evidence to prove the contrary: *Provided, nevertheless,* That any allegation or statement of fact made in any pleading in any such action, or the evidence produced on the trial in any such action, shall not be evidence against the party making or producing the same in any criminal action against such party.

SEC. 3. That every person who shall become a party to any such contract as is by this Act made void, and every person who shall be the agent, directly or indirectly, of any such party in making or furthering or effectuating the same; and every agent or officer of any corporation who shall, in any way or manner, knowingly aid in making or furthering any such contract to which such corporation shall be a party, shall be deemed gulty of a misdemeanor, and on conviction in the Superior Court shall be fined not less than one hundred dollars nor more than five hundred dollars, and may be imprisoned in the discretion of the Court.

SEC. 4. That every person who shall, while in this State, consent to become a party to any such contract made in another State, and every person who shall, as agent of any person or corporation who shall become a party to any such contract made in another State, in this State do any act, or in any way aid in this State in making or furthering such contract so made in another State, shall be deemed guilty of a misdemeanor, and on conviction in the Superior Court shall be fined not less than fifty or more than two hundred dollars, and may be imprisoned in the discretion of the Court.

SEC. 5. This Act shall be in force from and after its ratification.

Ratified the 25th day of February, A. D. 1889."

The defendant was not indicted or convicted for violating the Act of 1889, or any portion of the same.

The special verdict in this case differs from the special verdict in *State* v. *McGinnis* at the same term, and yet the

Supreme Court of North Carolina filed its opinion affirming the lower Court upon the authority of *State* v. *McGinnis.*

Among other differences, we deem it essential to call attention to the fact that in the *Gatewood case* the defendant's guilt as found in the special verdict of the jury depended, to some extent at least, upon the provision of Section 5 of Act of 1905, whereas in the *McGinnis case* the special verdict did not refer to or embrace such things as are condemned by Section 5 of Act of 1905.

ASSIGNMENTS OF ERROR.

Plaintiff in error assigned as grounds of error:

That Chapter 538, Laws of 1905, is in conflict with Section 1 of the 14th Amendment of the Constitution of the United States: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

ARGUMENT.

The question presented, therefore, is whether the Act of the North Carolina Legislature, as passed in 1905, is valid or invalid. The contention of the plaintiff-in-error is that Sec. 7 vitiates the entire Act, it being inconsistent with the Constitution of the United States by reason of the fact that it declares that *"this Act shall not be construed so as to apply to any person, firm, corporation or his or their agent engaged in the business of manufacturing or wholesale merchandising in the purchase or sale of the necessary commodities required in the ordinary course of their business."* Also that the presumptions created in the Act are within the prohibition against the deprivation of property without due process of law.

The Supreme Court of North Carolina in construing the same make no reference to *Conolly* v. *Union Pipe Company,* 184 U. S., 540, although it seems to be a case quite on all-fours with it. The *Conolly case* involved the construction of the Anti-Trust Act of the Legislature of Illinois, one section of which provided that *"the provisions of this Act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."* This provision was held to

vitiate the entire Act as it impinged on the 14th Amendment of the Constitution of the United States and was class legislation.

The North Carolina Act under consideration evidently means that a wholesale merchant or manufacturer or an agent of theirs, when engaged in purchasing or selling commodities required in the ordinary course of their business, is not liable to the provisions of such legislation. That is to say "A," a wholesale merchant, or his agent, can buy or sell "on margin," making a small deposit to cover fluctuations of the market, all necessary commodities, so as to "hedge" in his business, and his conduct in so doing is not criminal or presumptively so, while "B," in the like circumstances, is presumably guilty of a crime. The North Carolina Court declares that "there may be good reasons why the Legislature made this discrimination," and whether such reason is good and sound or the contrary, "Courts have no veto power upon such exercise of the police power," citing *State* v. *Barrett,* 50 S. E. R., 506.

The police power of the State, we submit, does not extend so far as this. The *Barrett case, supra,* cited as authority for this position, fails to sustain it, we think. In this case the Supreme Court of North Carolina upheld the constitutionality of an Act of its Legislature which provided that it should be unlawful to sell liquor in certain territory, and which also provided that the keeping in his possession by any person of more than a quart of spirits raised the presumption that he was a dealer. This decision upholds the power of the Legislature to make an apparently innocent act criminal, but does not consider the question of class legislation, for no such question was presented. May we not, however, believe that the decision in *Barrett's case* will not stand the test should it finally reach this Court for review. As has been said by this Court, every individual is entitled not only to the equal protection of the laws, but also to the protection of equal laws. Now a law which raises a presumption of guilt when "A" does some act, but which fails to raise such presumption when "B" does the same act is not an equal law. A manufacturer has on hand a large lot of cotton on a declining market. To protect his mill he sells cotton and puts up a margin. He is not guilty under the Act of the North Carolina Legislature. But a country merchant, having on hand a lot of cotton which he took in barter, and the market declining, sells on margin to hedge and he is guilty. In the *Conolly case* the defense

that the statute was in exercise of the police power of the State was disposed of by the Supreme Court of the United States, as follows:

"The question of Constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the State, which, as often stated by this Court, were not included in the grants of power to the general government, and therefore were reserved to the States when the Constitution was ordained. But the Constitution of the United States is the supreme law of the land, anything in the constitution or the statutes of the States to the contrary notwithstanding, and a statute of a State, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a State enactment, whatever may be the source from which the power to pass such enactment may have been derived. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

The defense that the objectionable section could be eliminated and the remainder of the Act enforced was disposed of as follows:

"The principles applicable to such a question are well settled by the adjudications of this Court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the Legislature, then the entire statute must be held inoperative. The first section of the Act here in question embraces by its terms *all* persons, firms, corporations, or associations of persons who combine their capital, skill or acts for any of the purposes specified, while the 9th Section declares that the statute shall not apply to agriculturalists or live-stock dealers in respect to their products or stock in hand. If the latter section be eliminated as unconstitutional, then the Act, if it stands, will apply to

agriculturalists and live-stock dealers. Those classes would in that way be reached and fined, when, evidently, the Legislature intended that they should not be regarded as offending against the law, even if they did combine their capital, skill, or acts in respect to their products or stock in hand. Looking, then, at all the sections together, we must hold that the Legislature would not have entered upon or have continued the policy indicated in the statute unless agriculturalists and live-stock dealers were excluded from its operation, and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the 9th Section. Whether it is also within the prohibition against the deprivation of property without due process of law is a question which it is unnecessary to consider at this time."

In respect to what constitutes a denial of the equal protection of the laws, the Court said:

"But upon this general question we have said that the guaranty of the equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

The Court said further:

"In *Hayes* v. *Missouri*, 120 U. S., 68, we said that the 14th Amendment required that all persons subject to legislation limited as to the objects to which it is directed, or by the territory within which it is to operate 'shall be treated alike, under like circumstances and conditions, both in privileges conferred and in the liabilities imposed.' 'Due process of law and the equal protection of the laws,' this Court has said, 'are secured, if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.' "

The Supreme Court of North Carolina in its opinion in this case say that this Act was doubtless hastily drawn, for "Section 7 is clearly not germane to the statute which is for the prohibition of the establishment or opening an office for the purpose of engaging in or carrying on the business of a Bucket Shop." However hastily the Act may have been drawn, it must conform to the Constitution of the United States. In the opinion of the Supreme Court of North Carolina, it is stated that Section 7 was added to the bill "in the

second house and after it had passed the first house." We submit that this fact strengthens our contention that Section 7 is intended, as it is expressed, to accomplish a definite purpose, to-wit: to exempt wholesale merchants and mill men. It will be noted that Section 7 is very general in its terms, embracing "*any* person, firm, corporation or his or their agent," and it clearly appears that a manufacturing establishment or a wholesale merchant may employ an agent to purchase or sell necessary commodities in the course of their business, and to this end that said agent can with impunity, without any presumption of guilt, disregard the Act and not be amenable to the punishment embraced in Section 4, Section 5 and Section 6 of said Act. Indeed such an agent would not fall under the condemnation of Section 3 of said Act, and no discovery touching anything done by himself or others contrary to the provisions of the Laws of 1889 could be enforced.

Considering Section 7 in detailed connection with each of the other sections of the Act, it appears conclusively that Section 7 is in the nature of a proviso to each of the other sections; and such connection is established by the phraseology of Sec. 7, for in the beginning it says: "That this Act shall not be construed," etc., which means that no part or provision of the Act shall be so construed as to apply to the excepted classes.

Hence, when appended to Section 1, which is as follows: "SECTION 1. That it shall be unlawful for any person, corporation, or other association of persons, either as principal or agents, to establish or open an office or other place of business in this State for the purpose of carrying on or engaging in any such business as is forbidden in this Act, etc., in Chapter 221 of the Public Laws of North Carolina of 1889," it would read, provided that manufacturers and wholesale merchants may deal and trade in the manner forbidden by this section, if they confine their operations to such commodities as are necessary in the ordinary course of their business.

It will become apparent upon a careful reading of the exception, "in the purchase or sale of the necessary commodities required in the ordinary course of their business," that the limitation is upon the class of commodities bought and sold, and not upon the *manner of the "purchase or sale."* Indeed, the whole scope and purpose of the Act is directed to the prevention of certain modes or methods of dealing or

speculation, regardless of the article, product or commodity that is purchased or sold; and the *only* purpose and effect of Section 7 is to remove all restrictions, which would be otherwise imposed by the Act, upon the mode or manner of purchase and sale by manufacturers and wholesale merchants of such articles and commodities as are handled in their usual course of business. So that if the purchase or sale is made by a manufacturer or wholesale merchant, and the commodity is such as falls within his line of business, all restriction imposed generally by the Act is removed, and it does not apply.

Likewise as to Section 2 of the Act, which is as follows:

"SECTION 2. Any person, corporation or other association of persons, who shall, as principal or agent, violate Section 1 of this Act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined and imprisoned in the discretion of the Court."

Provided this section shall not be construed so as to apply to manufacturers or wholesale merchants, if they shall confine their speculations to commodities within their respective lines of business.

The other sections of the Act, 3, 4, 5 and 6, are concerned with the establishment of proof alone, and the creating of certain artificial and arbitrary presumptions from certain predicaments of fact, but Section 7 is also to be appended to each as a proviso. Hence, notwithstanding the admission of any of the facts specified in these sections of the Act by the manufacturer, or wholesale merchant, no presumption of guilt arises and he is relieved from the burdensome and disgraceful presumption of crime which is cast upon all the other people under like circumstances. This conclusion cannot be avoided, because of the language of the law itself. *Lex ita scripta est.*

Section 7 was an amendment engrafted upon the bill after it went to the Senate, it having originated in the House of Representatives, and was adopted and reported by the committee in charge at the urgent request of the cotton-mill men and wholesale dealers, whose representatives were heard in debate and who argued at length the advisability of incorporating the amendment.

The case of *Conolly* v. *Union Sewer Pipe Co.* has been uniformly followed by Courts since its rendition, and we respectfully call the attention of this Court to the following cases in which it is cited:

In *Union Co. National Bank of Liberty* v. *Ozan Lumber* Co., 127 Fed. Rep., 211, the Court decided that the law of the State of Arkansas requiring all negotiable instruments taken in payment for any patent medicine or thing, or any patent right, to be on a printed form stating the consideration on its face, and declaring all such notes not showing on their face for what they were given absolutely void, but which further provided that "this Act shall not apply to merchants and dealers who sell patented things in the usual course of business," is void as in violation of the provisions of the 14th Amendment to the Federal Constitution, that no State shall deny to any person within its jurisdiction the equal protection of the laws.

In *Brown* v. *Jacobs Pharmacy Co.,* 115 Ga., 453, the Court held that the Georgia statute of 1896, known as the Anti-Trust Act, which provided that the provisions of the Act should not apply to agricultural products or live stock in the possession of the producer or raiser, was unconstitutional by reason of the exemption stated.

In *State* v. *Mitchell,* 79 Me., 66, the Court held that the statute (Chapter 227, Laws 1901), which undertook to exact a license from all hucksters and peddlers and to exempt all residents of the town who paid taxes amounting to $25 on their stock of goods, was void because it imposed an arbitrary and unreasonable discrimination, and that the statute could not be effectuated by disregarding the exemption and exacting a license from all persons; that the legislative intent would be violated by requiring persons, who had been declared exempt, to pay license. In this case the exemption was as follows: "But any resident of a town having a place of business therein and paying taxes to the amount of $25 on his stock in trade, can peddle goods in his own town without paying license fee whatever."

In *Matthews* v. *People,* 202 Ill., 389, the Court says: "Section 8 of the free employment agency Act of 1899, which prohibits superintendents of agencies from furnishing workmen or lists of workmen to employers whose men are on a strike or lock-out, is in aid of strikes, regardless of their justice, is repugnant to the Constitution, and being inseparable from the other provisions, the whole Act is void. The Legislature has no power to deny to an employer whose men are out on a strike or lock-out, the right to obtain workmen from free employment agencies and at the same time grant such right to other employers not similarly situated. The

Court says: "That is a principle, as laid down in *Conolly* v. *Union Sewer Pipe Co.*, which is precisely applicable to the present case, where a greater burden is imposed by Section 8 upon employers who are subjected to strikes and lock-outs, than upon other employers in the same calling and condition who are not subject to such strikes and lock-out, irrespective of the justice or propriety of the strike or lock-out."

In *Standard Oil Co.* v. *Spartanburg*, 66 S. C., 37, the Court says: "We come now to the consideration of the most important question in the case, which is whether the exemption from taxes of those merchants and dealers handling oils on which the license had been paid, was a reasonable classification. It cannot be successfully contended that the exemption from the payment of the license tax was intended for the benefit of the municipality, for the tendency of the classification was to lessen its revenue; nor can it be argued that the exemption was in any sense an encouragement to commerce, for the merchants and dealers under this classification conducted their business in no respect different from those who paid the license tax. It can scarcely be insisted that it was for the benefit of those who paid the tax, as its tendency was to create a large number of competitors in business with them, especially when we have before us one of the parties who paid the tax, objecting to its illegality. We are irresistibly forced to the conclusion that the exemption was intended as a mere favor to those included within the classification, and it was therefore unconstitutional."

In *Kellyville Coal Company* v. *Harrier*, 207 Ill., 624, the Court says: "Sections 3 and 4 of an Act to provide for the payment of wages in lawful money and to prohibit the trucking system and to prevent deductions from wages, except for lawful money actually advanced, is unconstitutional, because the Legislature has no power to provide that one possessed of property may not sell it to another and agree that the latter shall work in payment. The exemption of farmers from the operation of the above sections, prohibiting employers from setting off debts of employees against claim for wages, creates an unjust discrimination which invalidates the Act. The exemption is contained in Section 6 of the Act, as follows: 'Nothing in this Act shall be so construed as to include the business of farmers, or farmer laborers or servants.'"

In *Greenwich Ins. Co.* v. *Carroll*, 125 Fed. Rep., 129, the Court says: "The provisions of the Iowa Code, Section 1754, which makes it unlawful for two or more fire insurance

companies doing business in the State to enter into any agreement as to the amount of commissions to be allowed agents, or as to the manner of transacting fire insurance business in the State, are invalid, as depriving insurance companies of the liberty of contract secured to all persons by the 14th Amendment and to the equal protection of the laws."

In *Ballard* v. *Mississippi Cotton Oil Co.*, 81 Miss., 507, the Court says: "Whenever the Court finds on the face of a statute a number of different provisions, some constitutional and some not, it may sever them, if they are not interdependent, striking out the unconstitutional provisions and allowing the valid ones to stand. This is what is meant by the severance of a statute; but whenever a Court, in order to uphold the constitutionality of a statute, has to interpolate therein provisions not put there by the Legislature, this is no case of severance or a proper limitation of the provisions which are in the statute by judicial construction. Such action is nothing less than pure judicial legislation, and this cannot be defensible."

In *In re Pell*, 181 N. Y., 48, the Court says: "Chapter 76 of the Laws of 1899, providing for tax upon remainders and reversion which had vested prior to June 30, 1885, upon their coming into actual possession or enjoyment is upon its face an amendment to the tax law relating to transfers of property (Laws of 1896, Chapter 908), and imposes a tax upon the right of succession to property; it is not an exercise of legislative power imposing a direct tax thereon and is unconstitutional and void because it diminishes the value of vested assets, impairs the obligation of a contract and takes private property for public use without compensation; if, however, it should be regarded as imposing a direct tax upon property, the same result would follow, for the reason that it discriminates against a limited class of remaindermen and imposes the burden unequally upon the owners of an estate sought to be taxed."

Citing from *Conolly* v. *Union Sewer Pipe Co.*, the Court says: "The difficulty is not met by saying that generally speaking the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations in order to subserve public objects, for this Court has held that a classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can

never be made arbitrarily and without any such basis, but arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this. No duty rests more imperatively upon the Courts than the enforcement of those constitutional provisions intended to secure the equality of rights which is the foundation of free government. In this case it was insisted by Pell that the statute was invalid for two reasons: first, the law does not subject to the tax a class of property, but it does subject certain discriminating persons divined by the character of their ownership to the payment of the tax; second, the law does not apportion the burden equally upon all the owners designated, but discriminates between different owners; the measure of the property tax imposed as to some owners is 5 per cent.; others only 1 per cent., and still others it is nothing."

In *People* v. *Orange Co. Road Construction Co.*, 175 N. Y., 84, the Court says: "A statute prohibiting any person or corporation from contracting with the State or a municipal corporation from requiring more than eight hours' work per day, and making a violation thereof a misdemeanor, is unconstitutional and void, as it creates an arbitrary distinction between persons contracting with the State and a municipality and other employers of labor, thus violating the provisions of the 14th Amendment to the Federal Constitution."

The *Conolly case* is cited in the case of the *State of Texas* v. *The Shippers Compress and Warehouse Co.*, 95 Texas, 603. This case involved the construction of the Texas anti-trust law of 1895, which contained a provision that it should not be held to apply to live-stock or agricultural products in the hands of the producer or raiser, nor should it be understood or construed to prevent the organization of laborers for the purpose of maintaining any standard of wages. In this case the Texas Court, referring to the *Conolly case*, says: "In the case of *Conolly* v. *Union Sewer Pipe Co.*, the Supreme Court of the United States held that a statute of the State of Illinois in all essential particulars the same as the Act of 1895, was in conflict with the 14th Amendment to the Constitution of the United States, because it excepted agricultural products and live-stock while in the hands of the producer or raiser. We recognize the superior authority of the Supreme Court of the United States upon this question and in obedience to this decision we shall hold,

that in it so far as the Law of 1905 comes within the terms of the *Conolly case*, it is invalid; it will not support an action by the State to recover a penalty for violation of the law, nor will it in suits between corporations or individuals consider a defense based upon the fact that the right of action originated in a violation of the anti-trust law."

The case of the *State of Texas* v. *Laredo Ice Co.*, 96 Texas, 461, was instituted to recover penalties for a violation of the anti-trust law of 1899. The law of 1899 did not contain the provision of the law of 1895 exempting certain persons from the operation of the law. It was contended, however, that as a section of the law of 1899 contained a provision that the law should be held to be cumulative of all laws now in force in the State, that this provision made one law of the Act of 1899 and the Act of 1905 and that the exculpatory provisions of the former became part of the latter, and therefore made it unconstitutional under the *Connolly case*. The Supreme Court of Texas, however, rejected this contention and held that it was not cumulative in the sense suggested and did not contain as part of the law the discriminating feature of the Act of 1895, and was therefore constitutional—constitutional because *it did not contain such exception.*

In the recent case of the *National Cotton Oil Co.* v. *The State of Texas*, Supreme Court Advance Sheets, October Term, 1904, No. 9, p. 379, the simple question decided was, that the State of Texas had a right to withdraw its license from any foreign corporation to do business within the State, although the statute imposing the conditions upon which such foreign corporation could do business was unconstitutional.

This case followed the case of *Doyle* v. *Ins. Co.*, 94 U. S., 635, that the State had a right to oust a foreign company if it removed its cases to the Federal Court, not because removals were a good reason for ousting the company, but because the State had the right to exclude it without reference to the reason. As is said in the case of *R. R. v. State*, 31 N. J. Law, 531, "it is not denied that the corporate existence of a company is recognized not by right, but by grace, in foreign jurisdictions and that each government has the right to refuse to recognize such existence, except on its own conditions.

THE ACT OF 1905 RENDERS VOID THE ACT OF 1889.

It is plain that the Act of 1889 was a dead letter until the Act of 1905 vitalized it by making certain innocent things presumptive evidence of guilt.

Now, by express legislative enactment, the Act of 1905 is incorporated into the Act of 1889, so that a retail merchant, under Section 1 of the Act of 1889, cannot recover if he sue upon a contract where he has put up a margin, but a wholesale merchant can recover under like conditions. If we understand the opinion of the Supreme Court of North Carolina, Section 5 of the Act of 1905, wherein it is provided that the putting up of a margin is presumptive evidence that one has violated the Act of 1889, taken in connection with Section 7, is a discrimination in favor of the wholesale dealer and the manufacturer as against the retail dealer and others, but the Court says that such discrimination is permissible under the police power of the Legislature. We have seen that in the *Conolly case* the opposite seems to be law. Now, if only one material section, to-wit: Section 7 of the Act of 1905, is a discrimination in favor of the manufacturer and wholesale dealer, in so far as it relates to Section 5 of said Act, we maintain that the whole Act is just as effectually void as if the North Carolina Supreme Court had held all of said sections to be discriminative.

It is certain that when a manufacturer or wholesale dealer goes upon the market to buy or sell necessary commodities in the course of his business he may lawfully put up a margin, i. e., hedge. Now Section 1 of the Act of 1889 makes this a void contract. Section 2 permits the defendant to suggest in his answer that it is that kind of a contract and throws the burden on the plaintiff to show the contrary and Section 3 makes it a felony. But Section 7 and Section 5 of the Laws of 1905 expressly exempt from the operations of the Act of 1889, under these same conditions, any and all persons engaged in the business of manufacturing, etc. Is it not plain therefore that the Act of 1889 is still a dead letter so far as concerns manufacturers and wholesale dealers, but that it is quite effectual to prevent the rest of mankind from purchasing on a margin? It will be noted that this view was not considered or adjudged by the Supreme Court of North Carolina in its opinion in this case.

Is the Act Unconstitutional Because it May Deprive a Person of Property or Liberty Without Due Process of Law?

"The constitutional validity of a law is to be tested, not by what has been done under it, but by what may by its authority be done." *Stuart* v. *Palmer,* 74 N. Y., 183.

Considering the Acts of 1889 and of 1905 together, we discover that under their authority property may be confiscated. Let us suppose that there is an agreement to sell a car of corn, a part of the price is paid by way of margin, the corn is not actually delivered. Such a transaction under Section 5 of the Laws of 1905, would be *prima facie* void, and under Section 2 of the Act of 1889 if the seller sue upon the contract, and offer the writing alone in evidence, he fails to recover. Not only so, but by Section 5 the seller and the buyer will thereby be parties to a contract denounced by the Act of 1889, and no doubt subject to the pains and penalties of Sections 3 and 4 of the Act of 1889.

We maintain that the Act of 1905 is unusual in its artificial presumptions and in the manner in which it is engrafted upon the Act of 1889 and that it is not in harmony with the letter or spirit of the Constitution. The following cases are illustrative of the point at issue:

Munn v. *Illinois,* 94 U. S., 113.
Lawton v. *Steele,* 152, U. S., 133.
Colon v. *Lisk,* 153, N. Y., 188.

The following cases decide that presumptions of guilt attempted to be raised by acts of Legislatures are void:

People v. *Lyon,* 27 Hun., 180.
State v. *Beswick,* 13 R. I., 218.
State v. *Beach,* 43 N. E. R., 951.
Cummings v. *Missouri,* 4 Wall., 328.
Wynehamer v. *People,* 13 N. Y., 446.
San Mateo v. *R. R.* (C. C.), 13 Fed., 722.

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